

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Review of the Pioneer's )  
Preference Rules )

ET Docket No. 93-266

To: The Commission

REPLY COMMENTS OF Pagemart, Inc.

PageMart, Inc., ("PageMart"), by its attorneys, hereby replies to the comments filed by various parties in response to the above-captioned Notice of Proposed Rulemaking, FCC 93-477, released October 21, 1993 ("NPRM"). The NPRM initiates a review of the Commission's pioneer's preference rules in light of the recent enactment of competitive bidding authority.<sup>1/</sup>

The majority of commenters prefer retention of the pioneer's preference system. In general, they claim that the auction process will not eliminate the problems that prompted the creation of the pioneer's preference -- the inability of innovators to recoup the costs of technological

<sup>1/</sup> See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, 107 Stat. 387 (1993) (the "Budget Act"); Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rulemaking (FCC 93-455, released October 12, 1993) ("Competitive Bidding Rulemaking").

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development because of the sometimes arbitrary nature of the Commission's licensing processes.<sup>2/</sup> Some also argue that elimination of the preference system would have a disproportionate negative impact on small businesses and minorities, because these entities will be at a financial disadvantage in the bidding process.<sup>3/</sup>

As PageMart demonstrated in its initial comments, there no longer exists any justification for the pioneer's preference system; it should be eliminated.<sup>4/</sup> However, even if one assumes arguendo that the system should be retained, most of the commenters who support this result fail to recognize that the system must, at a minimum, be substantially modified to ensure an equitable and rational implementation of the competitive bidding authority.

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<sup>2/</sup> See, e.g., Comments of Satellite CD Radio, Inc.; Comments of Suite 12 Group; Comments of Cox Enterprises; Comments of Omnipoint Communications.

<sup>3/</sup> See Comments of Adams Telecom, Inc., et al. at 8; Comments of the Chief Counsel for Advocacy of the U.S. Small Business Administration at 2; Comments of Advanced Cordless Technologies at 3. PageMart submits that these concerns have been more than adequately addressed in the form of incentives for "designated entities" under consideration in the Competitive Bidding Rulemaking.

<sup>4/</sup> See PageMart Comments at 2-3; Comments of BellSouth at 8; Comments of Paging Network ("PageNet") at 5. See also, Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1970) (per curiam); City of Chicago v. FPC, 458 F.2d 731, 742 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972).

**I. THE COMMISSION MUST REQUIRE PIONEER'S PREFERENCE GRANTEES TO PAY A FAIR PRICE FOR THEIR LICENSES.**

**A. Allowing Pioneer's Preference Grantees To Receive Free Licenses Could Create Substantial Marketplace Distortions.**

As PageMart has demonstrated previously<sup>5/</sup>, the pioneer's preference was designed solely to provide regulatory certainty for an innovator. It never was intended to result in a financial windfall or to create an imbalance in the marketplace; once the preference winner had its license, it was free to compete on an equal footing with all other licensees. If the Commission decides to retain the preference system, it must ensure that both current and future preference grantees do not receive an unfair advantage as a consequence of the auction process.<sup>6/</sup>

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<sup>5/</sup> See PageMart Comments on NPRM at 6; PageMart Petition for Reconsideration (GEN Docket No. 90-314, ET Docket No. 92-100), filed September 10, 1993; PageMart Opposition to and Comments on Petitions for Reconsideration (GEN Docket No. 90-314, ET Docket No. 92-100), filed October 25, 1993; and PageMart Reply to Opposition of Mobile Telecommunication Technologies Corporation to Petitions for Reconsideration (Docket No. 90-314, ET Docket No. 92-100), filed November 4, 1993.

<sup>6/</sup> As PageMart has discussed in detail in its previous submissions, requiring current grantees, including the Mobile Telecommunication Technologies Corporation ("Mtel"), to pay a fair price for their licenses is well within the Commission's discretion, and is the only equitable option as a result of the enactment of the competitive bidding authority. See, e.g., PageMart Comments at 7-9. As PageNet notes in its Comments, at 11, there is no reason to believe that Mtel has devoted more resources than have its competitors to developing their respective technologies. Like its competitors, Mtel made its investments without any assurance that it  
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Failure to harmonize the pioneer's preference system with the new reality of an auction-based licensing system may have a substantial adverse impact on the ability of some non-preference holders to obtain financing. The traditional factors that investors and lenders review in determining whether to commit resources to a particular company did not change with the adoption of the pioneer's preference system. Those factors include, inter alia, existing capitalization, management operating history, and, most importantly, the overall likelihood that the company will be able to succeed in the marketplace by virtue of whatever competitive strengths it possesses. To date, no prospective lender or investor has ever expressed concern to PageMart as to whether it or one of its competitors has a pioneer's preference relevant to the market under consideration.

The reason for this is quite simple to comprehend. Prior to the enactment of the competitive bidding authority, licenses were free. The assurance of a license provided by a pioneer's preference did not alter the calculus used to decide whether a company had the strengths needed to succeed in the marketplace. All that the preference meant was that the holder had cleared the most rudimentary hurdle for a

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<sup>6/</sup> (...continued)

would receive a preference, let alone a free license. It is clear that Mtel would have made the same investments even if the Commission had never adopted the pioneer's preference policy.

financial infusion: it had the assurance of the right to enter into competition. The ultimate consideration was (and remains) the likelihood of success in that competition.

That basic competitive calculus is substantially skewed, however, if preference holders now are to receive free licenses, while their competitors must pay dearly for theirs. The different cost structures borne by each firm may have a significant adverse impact on the competitiveness of those who have to pay for their licenses. The preference holder's substantially lower costs may well tip the balance against investments in companies who seek to compete with preference winners, companies whose proprietary technology or services might otherwise prove more successful in the marketplace than those of the preference winner.

Just as the Commission would not contemplate suggesting that the Treasury Department ought to pick up the tab for constructing a preference winner's network, there is no public interest rationale that supports granting that preference winner a free license, when its competitors must expend substantial sums for identical assets. The Commission never intended the pioneer's preference system to alter the competitive balance in the market.<sup>1/</sup>

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<sup>1/</sup> Similarly, the Commission never intended the pioneer's preference system to be a substitute for investors' due diligence. Many commenters seem confused in this regard. In essence, a pioneer's preference is the result of a Commission finding that the technology in question appears to be (1) relatively innovative and  
(continued...)

B. There Is No Basis For Providing Preference Winners With Deep Financial Discounts.

A number of commenters have proposed that, if the Commission requires preference grantees to participate in the competitive bidding process, they be provided with deep discounts on winning bids.<sup>8/</sup> While PageMart has expressed support for a system in which preference holders would be granted a small discount (e.g., 5%),<sup>9/</sup> there is no public interest justification for anything more.

As PageMart has demonstrated above, the pioneer's preference system was not intended to provide grantees with a financial windfall. The advent of the competitive bidding system will enable those innovators who truly have made technological advances to attract the investment capital

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<sup>7/</sup> (...continued)

(2) capable of practical application. See generally Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, First Report and Order, FCC 93-329, released July 23, 1993, at ¶¶ 55-56. The Commission specifically does not inquire -- let alone make any judgments -- with regard to whether demand for such a product/service exists or whether it is superior to some other product/service. As Digital Satellite Broadcasting ("DSB") put it, "if a pioneer has a truly innovative technological advancement, the value of the innovation will be considered in the marketplace and the pioneer will be able to secure sufficient financing to obtain a license." DSB Comments at 2.

<sup>8/</sup> See, e.g., Comments of Suite 12 Group, at 14; Comments of Arraycom, Inc., at 9; Comments of NYNEX, at 3. The Commission suggested that, if it eliminated the preference system, it could provide some advantage to designated pioneers by requiring them to pay only 75% of their winning bid. NPRM at ¶ 12.

<sup>9/</sup> See PageMart Comments at 7.

needed to participate fully in the auction system, particularly if they are able to market their pioneer's preference as some sort of FCC imprimatur. Providing a deep discount over winning bids is only marginally different from providing a free license, and would serve no purpose but to enrich unfairly a few preference grantees. Certainly, the public interest would not be served either by the loss of revenue to the Treasury or by the skewing of the marketplace in the manner discussed above.

II. THE COMMISSION SHOULD ALTER ITS PIONEER'S PREFERENCE RULES TO AVOID POTENTIAL ABUSES.

None of the commenters in this proceeding have expressed any opposition to PageMart's proposals that the Commission impose safeguards on the pioneer's preference system, assuming that it is retained.<sup>10/</sup> Several commenters have expressed views in support.<sup>11/</sup> As PageMart has noted previously, the current pioneer's preference rules do not contain adequate safeguards to prevent substantial abuse. PageMart urges the Commission to adopt rules that would: (1) require preference grantees to build the systems for which they have been granted preferences; and (2) limit licenses awarded pursuant to preferences to the principal geographic area in which the innovation was tested.

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<sup>10/</sup> See PageMart Comments at 3-5.

<sup>11/</sup> See, e.g., Comments of BellSouth at 17, note 35; Comments of Nextel at 9.

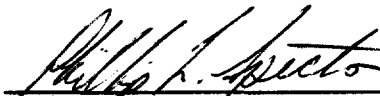
CONCLUSION

The Commission has wisely chosen to review the troubled pioneer's preference system in light of the dramatic changes that will result from the implementation of the competitive bidding authority. PageMart urges the Commission to eliminate the preference system, which has proven to be unworkable, costly and inefficient. With the advent of the competitive bidding system, there is no justification for its continuation. If the Commission nonetheless chooses to retain the pioneer's preference system, it should substantially modify the program, for both current and future grantees, in order to avoid unfair advantages and potential abuse.

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### Certificate of Service

I, Ginger S. Pribble, do hereby certify that copies of the foregoing Reply Comments of PageMart, Inc. were served via first-class, postage prepaid mail, on this 22nd day of November, 1993, to the parties listed below:

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